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No. 97-600

In The

Supreme Court of the United States

October Term, 1997

JOHN KRONBERG, *et al.*,

Petitioners,

vs.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the due process clause of the Fourteenth Amendment guarantee the Petitioner a right to an appellate stay during the pendency of his appeal or may a state appellate court terminate an appellate stay upon a finding that an appeal was taken solely for the purpose of delaying enforcement of a judgment and/or that in the interest of justice the stay should be terminated?

PARTIES TO THE PROCEEDING

The Respondent, Chicago Title Insurance Company's, parent corporations are Chicago Title & Trust Company and Allegheny Corporation. Respondents nonwholly owned subsidiaries are Tri-Safe, Inc., Service Title of Virginia, Inc., LaSalle County Title, LLC, Chicago Title Insurance Company of Puerto Rico, Catco, Inc., CTP, Inc., SKLD, Inc., Title Data, Inc., and Image Library Co., LLC.

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OBJECTION TO JURISDICTION

Jurisdiction does not exist under 28 U.S.C. § 1257(a) because there has been no final judgment or decree rendered by the highest court in Connecticut. Petitioner's Petition For Connecticut Supreme Court review was dismissed, not denied. The Petition was dismissed because review of a denial of Motion For Review is not a final judgment or determination for which jurisdiction existed for Connecticut Supreme Court Review. *See* Conn. Gen. Stat. § 51-197f; *State v. Ayala*, 222 Conn. 331, 338 (1992); *State v. Carter*, 212 Conn. 811 (1989). As conceded by the Petitioner, his appeal is still pending in Connecticut's intermediate appellate court.

STATEMENT OF THE CASE

Through manipulation and abuse of the judicial system, including bankruptcy and appellate filings, Petitioner[1] has been able to maintain living in a $330,000, 4,000 square foot home situated on 4.9 acres of land in Cheshire, Connecticut since 1990 without paying one penny towards his payment obligation on the note and mortgage now owned by the Respondent.

Respondent's predecessor in interest commenced a foreclosure action in November of 1991 after the Petitioner defaulted on his payment obligation on a note and mortgage. Five and a half (5 1/2) years later, on March 7, 1997, a Judgment of Strict Foreclosure finally entered. Petitioner had successfully delayed the case for 5 1/2 years. The Petitioner filed an Answer, Special Defenses and Counterclaims to the foreclosure complaint in which he asserted mortgage recision rights on property he no longer owned. On November 7, 1994, the trial

1. Although there are three Petitioners, because only John Kronberg was a party to the action below and was the only obligor on the note and mortgage, he will be referred herein as the "Petitioner".

court (Celotto, J.) granted the Respondent's Motion to Strike[2] the Answer, the Second Special defense and both Counterclaims.[3]

On November 9, 1994, the Petitioner filed a Revised Answer with no special defenses plead. On September 25, 1995, the court (Celotto, J.) granted the Respondent's Motion For Summary Judgment against John Kronberg as to liability on the note and mortgage. The Petitioner and his nonparty spouse and son filed an appeal on October 12, 1995. The Appellate Court dismissed the appeal on January 24, 1996, but *sua sponte* ordered the appeal stayed pending entry of the foreclosure judgment.

The Appellate Court Order resulted in the loss of the appellate stay so Petitioner then had his Corporation, Crown Hill Estates, Inc., who he had earlier quitclaimed title to the subject property, file a bankruptcy petition which invoked the bankruptcy automatic stay. After numerous court hearings and motions, the bankruptcy court granted the Respondent relief from stay effective as of January 13, 1997.[4]

On March 7, 1997, the foreclosure action was tried to the court (Celotto, J) and, after a full evidentiary hearing, a Judgment

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2. Connecticut's motion practice equivalent of a Fed. R. Civ. P. Rule 12(b)(6) motion.

3. The Defendant and nonparty spouse and son had plead unfair trade practices and Recoupment Claims in the counterclaims based upon alleged Truth-in-Lending violations. The Second Special Defense which was purportedly filed by the nonparty spouse and son asserted lack of jurisdiction based upon the Respondent's failure to file a notice to quit.

4. The Bankruptcy Court also ordered in connection with the relief from stay that the debtor corporation pay the Respondent $22,106.53 by March 21, 1997. The debtor has not complied with the Bankruptcy Court order as no payment has been made to date.

of Strict Foreclosure entered. The court found the debt to be $324,724.90, awarded $17,000 in attorney fees and set the first law day for May 12, 1997. On March 12, 1997, the Petitioner filed an amended appeal.[5] Under Connecticut appellate rules of practice, Petitioner once again received the benefit of an appellate stay which became effective automatically upon filing his amended appeal.

On April 2, 1997, Respondent filed its Motion to Terminate the Appellate stay under Connecticut rules of appellate procedure, Connecticut Practice Book Section 4046. A hearing on the motion was scheduled for April 18, 1997. Neither the Petitioner nor his counsel bothered attending the hearing. The trial court, after hearing and a review of the record, granted the Respondent's motion. Petitioner then sought immediate review of the order with the Connecticut Appellate Court pursuant to Connecticut Practice Book Sections 4049 and 4053. The Appellate Court denied the motion on May 21, 1997.

On July 7, 1997, the trial court reopened the foreclosure judgment for the purpose of continuing the foreclosure. To that end, the trial court re-set the law days to begin on August 11, 1997. On August 7, 1997, on the eve of his new law day, Petitioner filed a Chapter 13 bankruptcy petition. The bankruptcy filing triggered the automatic stay which stayed the running of the August law days.

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5. Under Connecticut foreclosure law, under a Judgment of Strict Foreclosure, the owner/borrower will be divested of title on his law day if he does not tender the full amount of the Judgment to the Plaintiff/ mortgagee. A dilatory debtor, therefore, will use every means at his disposal to stay the running of the law day. Stays are typically invoked by the dilatory debtor by either a series of bad faith bankruptcy filings, appellate filings, or a combination of both.

On September 3, 1997, the Respondent filed its Motion for Relief from Stay in the bankruptcy court and a hearing on the Motion was scheduled for October 13, 1997. The bankruptcy court granted the motion and, again, neither the Petitioner nor his counsel attended the hearing.

On October 13, 1997, the trial court reopened the foreclosure judgment and re-set the law days to commence on December 22, 1997. Petitioner has not made one payment under his note and mortgage since 1990 and has failed to make any payment under either of his bankruptcy cases.

REASONS FOR DENYING THE WRIT

Petitioner has raised a procedural due process challenge to Connecticut's appellate practice that provides a mechanism to terminate an appellate stay when the trial court finds that an appeal has been taken solely for delay or that in the interest of justice the stay should be terminated. Petitioner, however, has not cited one case which supports his argument that he has a constitutionally protected right to have a stay in force throughout the entire course of appellate review. While it is beyond dispute that Petitioner has no constitutionally protected right to appellate review,[6] Petitioner, citing cases for the general proposition that procedural due process requires that ". . . an opportunity to be heard must be granted at a meaningful time and in a meaningful manner" claims to have been denied due process when an appellate stay is terminated. A review of Connecticut's rules regarding termination of appellate stays demonstrates that Petitioner's procedural due process rights were not violated.

Connecticut's procedures for terminating an appellate stay

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6. *See Griffin v. Illinois*, 351 U.S. 12, 21, 76 S. Ct. 640 (1941); *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S. Ct. 913 (1894).

comport fully with the procedural due process requirements of the Fourteenth Amendment. In order to have an appellate stay terminated, a party must file a motion with notice to the opposing side and a hearing must be had on the motion. The opposing party has a right to file an objection and to be heard. *See* Connecticut Practice Book Sections 4046 and 4042. In the present matter, Petitioner received notice of the motion, filed an objection and received notice of the hearing. For reasons only known to Petitioner and his counsel, they chose not to attend the hearing.

The trial court's decision to terminate the appellate stay and findings that the Petitioner's state court appeal was taken solely for delay and that the stay should be terminated in the interest of justice is fully supported by the record and the arguments that were before him. Pursuant to Practice Section 4046, the trial judge may terminate the appellate stay if he is of the opinion that the appeal was taken for solely for delay or if the interest of justice so require. The Petitioner had successfully delayed prosecution of this foreclosure action by filing special defenses and counterclaims, a premature appeal, a bankruptcy case, and an Answer which necessitated a trial. In the Amended Appeal, the Petitioner sought plenary review of all of the trial court's substantive rulings in this matter.

At the hearing on the Motion to Terminate the stay, the court considered and balanced the competing equities. Although the court did not issue a Memorandum of Decision, the Movant presented the court with the following review and analysis of the merits of the Petitioner's appellate issues. First, the Petitioner had insisted on a trial to prove that the value of the property *was substantially less* than the value offered by the Respondent. Based upon the evidence presented and the deference afforded to the trial court as the trier of fact on the issue of fair market

value, there was no basis to believe that a realistic possibility for reversal existed on this issue.[7]

Another appellate issue raised was the denial of the Petitioner's motion to add his spouse and son as new parties. Petitioner asserted that his wife and son were indispensable parties to the foreclosure action under the theory they were tenants and that tenants were indispensable parties. The theory was not supported by Connecticut law. Also, based upon the timing of the motion alone, there was no basis to believe that a realistic chance of reversal existed. The case had been pending for over 5 years and on the morning of trial the Petitioner sought to add these new parties. The granting of the motion would have further delayed this matter and the court acted well-within its discretion in denying the motion.

In connection with the appeal of the order granting summary judgment, the Petitioner appealed under the mistaken belief that he had filed a recoupment special defense. As was made clear at the Judgment hearing, when the Petitioner filed its substitute Answer after the granting of the motion to strike, the Defendant did not allege any special defenses. Therefore, an appeal based upon a defense not plead stood little chance of success.

In balancing the equities, the Judge who terminated the appellate stay was the same Judge who had made every substantive ruling in the foreclosure action. At the hearing on the Motion to Terminate, the Judge was in a position to evaluate

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7. Under either parties evidence as to fair market value, no equity existed and a Judgment of Strict Foreclosure was warranted. The question of equity is only relevant to the question of whether a sale should be decreed and that turns on whether there is sufficient equity in the property to justify the costs of a sale. The Petitioners insisted on presenting evidence to prove an even lower fair market value and his subsequent appeal on this issue supported the conclusion that the appeal was being pursued for reasons other than the merits of the legal determinations.

the likelihood of Petitioner's appellate success and weigh the equities between the parties. The debt owed exceeded the value of the property and the deficiency would continue to increase if the enforcement of the Judgment was denied. The chances of any recovery on a deficiency Judgment appeared remote based upon the financial information disclosed by the Petitioner's corporation in its bankruptcy case. The Petitioner had conceded at trial that it had not made a single payment on the note since 1990. The trial court acted well-within its discretion in deciding to terminate the appellate stay.

Connecticut appellate practice also provides for expedited appellate review of a decision to terminate a stay. *See* Connecticut Practice Book Section 4049. Petitioners took advantage of this review process in this case and filed a Motion For Review. Respondent filed its Opposition and the Appellate Court ultimately ruled against the Petitioner and decided not to modify the decision below.

As is made clear from the forgoing, Connecticut rules of appellate practice provided the Petitioner with ". . . an opportunity to be heard . . . at a meaningful time and in a meaningful manner." The Fourteenth Amendment has never been construed so far as to prohibit enforcement of a judgment before all avenues of appellate relief have been exhausted or to prohibit an Appellate Court from dismissing an appeal for failing to follow the rules or to prosecute an appeal with due diligence. In the present matter, the Connecticut procedures at issue permit the trial court to terminate the appellate stay if it finds that the appeal was filed in bad faith, namely for the sole purpose of delay. The Connecticut rules further provide for an expedited review by the appellate court of such an order. Accordingly, Connecticut's procedures comport fully with the due process requirements of the Fourteenth Amendment.

CONCLUSION

For the forgoing reasons, the petition should be denied.

Respectfully submitted,

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